



California Regional Water Quality Control Board

Los Angeles Region



Linda S. Adams
Agency Secretary

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Arnold Schwarzenegger
Governor

July 29, 2010

Mr. Gary Lee Moore
City Engineer
City of Los Angeles
Bureau of Engineering
1149 S. Broadway St. Suite 700
Mail Stop 490
Los Angeles, CA 90015

Via Certified Mail
Return Receipt Requested
Claim #7009 0820 0001 6812 5146

Mr. Jim Coppini
MCM Construction, Inc.
6413 32nd Street
North Highlands, CA 95660

Via Certified Mail
Return Receipt Requested
Claim #7009 0820 0001 6812 5153

COMPLAINT NO. R4-2010-0112 FOR ADMINISTRATIVE CIVIL LIABILITY AGAINST THE CITY OF LOS ANGELES, BUREAU OF ENGINEERING, BRIDGE IMPROVEMENT PROGRAM, FOOTHILL BOULEVARD BRIDGE WIDENING PROJECT AT BIG TUJUNGA WASH, SUNLAND, CALIFORNIA (FILE NO. 06-208)

Dear Sirs:

Enclosed is Complaint No. R4-2010-0112 for Administrative Civil Liability in the amount of \$70,318 against the City of Los Angeles and MCM Construction Inc., (hereinafter Dischargers) for the Discharger's failure to comply with the Federal Water Pollution Control Act (33 U.S.C. § 1351 et seq.) (Clean Water Act). Also enclosed is the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) Notice of Public Hearing to Consider an Administrative Civil Liability Complaint for this matter.

Unless waived, a hearing before the Regional Board or a Regional Board Hearing Panel (Hearing Panel) will be held on this Complaint pursuant to California Water Code §§ 13228.14 and 13323. Should the Permittee choose to waive its right to a hearing, an authorized agent must sign the waiver form attached to Complaint No. R4-2010-0112 and return it to the Regional Board by 5:00 pm on **August 30, 2010**. If we do not receive the waiver and full payment of the penalty by **August 30, 2010**, this matter will be heard before the Regional Board or Hearing Panel. An

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Mr. Gary Lee Moore
Mr. Jim Coppini

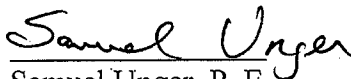
- 2 -

July 29, 2010

agenda containing the date, time, and location of the hearing will be mailed to you prior to the hearing date.

If you have any questions regarding this matter, please contact Ms. L.B. Nye at (213) 576-6785 or Mr. Dana Cole at (213) 576-5733.

Sincerely,

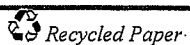


Samuel Unger, P. E.
Interim Executive Officer

Enclosures

cc: Ms. Shannon Chambers, Office of Enforcement, State Water Resources Control Board
Ms. Jenny Newman, Los Angeles Regional Water Quality Control Board
Mr. Jeff Ogata, Office of Chief Counsel, State Water Resources Control Board

California Environmental Protection Agency



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**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION**

In the matter of:)	Complaint No. R4-2010-0112
)	
City of Los Angeles, Bureau of Engineering, Bridge Improvement Program)	Violation of California Water Code § 13385
Foothill Boulevard Bridge Widening Project at Big Tujunga Wash)	
Sunland, California (File No. 06-208))	
)	
and)	
MCM Construction, Inc., General Engineering Contractors, and Contractor and Agent for the City of Los Angeles, Bureau of Engineering, Bridge Improvement Program)	
Foothill Boulevard Bridge Widening Project at Big Tujunga Wash)	
Sunland, California)	
)	

The CITY OF LOS ANGELES and its agent and contractor MCM CONSTRUCTION INC., (Dischargers) are alleged to have violated provisions of law for which the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) may impose civil liability pursuant to section 13385 of the California Water Code (CWC).

The Interim Executive Officer of the Regional Water Quality Control Board, Los Angeles Region (Regional Board) hereby gives notice that:

1. This Civil Liability Complaint is issued under authority of CWC section 13323.
2. The Discharger, the City of Los Angeles owns and/or is responsible for the right of way (ROW) located at the Foothill Boulevard Bridge, the Foothill Boulevard Bridge, and the Foothill Boulevard Bridge Widening Project at Big Tujunga Wash, three-quarters of a mile

north of the 210 Freeway from the Foothill Boulevard exit, Sunland, City and County of Los Angeles, California, Latitude 34.271620 N, Longitude 118.337830 W (the Site). The Discharger, MCM Construction was hired as a contractor and agent of the City of Los Angeles to perform construction activities at the Site. Unpermitted grading and construction activities and a hydraulic fluid spill occurred in the Big Tujunga Wash at the Foothill Boulevard Bridge Widening Project that may have or threatened to detrimentally impact the quality of the waters of the state and the United States (U.S.).

3. The Dischargers are alleged to have violated provisions of the law for which the Regional Board may impose civil liability pursuant to CWC section 13385 from the period from November 5, 2007, through the date this Complaint issues, July 29, 2010. This Complaint proposes to assess \$70,318 in penalties for the violation cited based on the considerations described herein. The deadline for public comments on this Complaint is 5:00 p.m. on August 30, 2010.
4. Unless waived, a hearing before a Regional Board Hearing Panel will be held on **October 27, 2010**, at 10:00 a.m. at 320 W. 4th Street, Los Angeles, CA 90013 (room to be determined). The Dischargers or their representative(s) will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of civil liability by the Regional Board. An agenda will be mailed to the Dischargers approximately ten days before the hearing date.
5. The Dischargers must submit any written evidence and/or information concerning this Complaint to the Regional Board no later than 5:00 p.m. on September 28, 2010, for the Hearing Panel's consideration. Any written evidence submitted to the Regional Board after this date and time may not be accepted or responded to in writing.
6. At the hearing, the Hearing Panel will consider whether to affirm, reject, or modify the proposed administrative civil liability, or to refer the matter to the Attorney General, or take other enforcement action.
7. This issuance of this Complaint is an enforcement action and is, therefore, exempt from the California Environmental Quality Act, pursuant to Title 14, California Code of Regulations, Section 15321.

ALLEGATIONS

8. **Site Location and Description:** The Site is three-quarters of a mile north of the 210 Freeway from the Foothill Boulevard exit, Sunland, City and County of Los Angeles, Latitude N 34.271620/W Longitude 118.337830. Foothill Boulevard is a principal road that extends in a northwest-southwest direction connecting the community of Lakeview Terrace to the north with the community of Sunland to the south in the city of Los Angeles. The Foothill Boulevard Bridge crosses the North Branch Big Tujunga Wash east of Hansen Lake. Construction on the Foothill Boulevard Bridge Widening Project was scheduled

within the 100-foot City owned right of way (ROW) located at the Foothill Boulevard Bridge over the Big Tujunga Wash.

9. **Named Dischargers:** The Dischargers are the responsible parties because they own, are responsible, and/or were contracted to perform construction activities on the Site property. The CITY OF LOS ANGELES owns and/or is responsible for the Site property, and is responsible for hiring MCM CONSTRUCTION, INC., as its agent and contractor to perform construction activities on the Site property. MCM CONSTRUCTION, INC., performed construction activities on the Site property as a contractor and agent for the CITY OF LOS ANGELES, and owns the equipment that was responsible for the grading, construction activities, and hydraulic fluid spill that occurred on the Site property.
10. **Regulatory Status:** On December 17, 2009, the Regional Board issued a CWC section 13267 investigative order (13267 Order) requiring the Dischargers to submit, by January 18, 2010 (an extension was granted to February 17, 2010), information relating to the unpermitted activities and discharge of hydraulic fluid into the waters of the state at the Foothill Bridge Widening Project at the Big Tujunga Wash at Sunland, California. The December 17, 2009, 13267 Order required the Dischargers to submit a technical report that contained data and information relating to the Foothill Bridge Widening Project at the Big Tujunga Wash, and the activities that took place prior to, during, and after the construction activities and hydraulic fluid spill at the Foothill Bridge Widening Project at the Big Tujunga Wash. On December 17, 2009, Regional Water Board Executive Officer Tracy J. Egoscue issued a Notice of Violation (NOV) to the Dischargers for spilling hydraulic fluid and engaging in unpermitted grading in the Big Tujunga wash, and for failing to obtain a Clean Water Act (CWA) section 404 permit from the U.S. Army Corps of Engineers (USACOE) and a CWA section 401 Water Quality Certification from the Regional Board (State Water Resources Control Board Order No. 2003-0017-DWQ) for these activities.
11. **Site Background:** The Dischargers are suspected of spilling forty (40) gallons of hydraulic fluid in the wash on May 13, 2009, and for engaging in unpermitted construction and grading activities while working on the Foothill Bridge Widening Project at the Big Tujunga Wash. The 13267 Order sought information on the status of any permits that had been issued for the construction project, the status of the 404 permit and the 401 water quality certification, the nature, length, and type of construction activities performed at the Site at the Big Tujunga Wash, and the amount of hydraulic fluid spilled at the Site into the Big Tujunga Wash.
 - a. The Site is three-quarters of a mile north of the 210 Freeway from the Foothill Boulevard exit, Sunland, City and County of Los Angeles, N Latitude 34.271625/W Longitude 118.337830. Foothill Boulevard is a principal road that extends in a northwest-southwest direction connecting the community of Lakeview Terrace to the north with the community of Sunland to the south in the city of Los Angeles. The Foothill Boulevard Bridge crosses the North Branch Big Tujunga Wash east of Hansen Lake. During the period covering November 2007 through June 2009, construction occurred at the Site on the Foothill Boulevard Bridge Widening Project at the Foothill Boulevard Bridge over the Big Tujunga Wash.

- b. On September 26, 2006, the City of Los Angeles initially applied for a CWA section 401 Water Quality Certification from the Regional Board for the Foothill Boulevard Bridge Widening Project at the Foothill Boulevard Bridge over the Big Tujunga Wash.
- c. On December 20, 2006, the USACOE issued a letter to the City of Los Angeles notifying the City of Los Angeles that a CWA section 404 permit was not required from the USACOE because the Foothill Bridge Widening/Expansion Project across the Big Tujunga Wash did not entail pier extensions, and was not a project that proposed to discharge dredge or fill material into a water of the U.S. or an adjacent wetland. The December 20, 2006, letter notified the City of Los Angeles that the USACOE determination did not preclude the need to comply with section 13260 et seq., of the CWC, and the 401 certification requirement.
- d. On March 5, 2007, Wallace Stokes, Environmental Coordinator, City of Los Angeles, notified the Regional Board that in terms of the nature of construction to be performed at the Site at the Foothill Bridge Widening Project over the Big Tujunga Wash, that "the structural base will not be expanded into waters, the structure will only be cantilevered."
- e. As presented to the Regional Board based on the March 5, 2007, representations from Wallace Stokes, Environmental Coordinator, City of Los Angeles, and the December 20, 2006, letter from the USACOE, CWA section 404 permits and section 401 Water Quality Certification letters were not required because the proposed project as presented would not discharge dredge and/or fill material into a water of the U.S. or state, and because the structural base of the project would not expand into waters of the U.S. or state.
- f. On May 14, 2007, and fully executed on June 6, 2007, the City of Los Angeles entered into a Streambed Alteration Agreement (SAA) with the State of California, Department of Fish and Game, to allow the City of Los Angeles and its contractor MCM Construction, Inc., to divert or obstruct the natural flow of, or change the bed, channel, or bank of, or use material from the streambed(s) of Big Tujunga Wash, a tributary to the Los Angeles River, Los Angeles County, California, Foothill Boulevard Bridge over Tujunga Wash. Latitude N 34.271625/Longitude W 118.337830.
- g. On May 15, 2009, the Regional Board was informed by Mary Meyers, California Department of Fish and Game, that a hydraulic spill had occurred in the Big Tujunga Wash at the Site.
- h. On May 22, 2009, and June 4, 2009, Dana Cole, Engineering Geologist, 401 Certification Unit, Regional Board, conducted inspections at the Site. Present during the May 22, 2009, inspection was Kenneth Wong, U.S. Army Corps of Engineers. During the May 22, 2009, inspection it was observed that portions of the Big Tujunga Wash had been graded, so a second inspection was scheduled for June 4, 2009.
- i. Present with Dana Cole during the June 4, 2009, inspection was Kenneth Wong, U.S. Army Corps of Engineers, Chris Medak, U.S. Fish and Wildlife Service. Also present

at the June 4, 2009, inspection on behalf of the Dischargers were Jim Cassley, Mike Hames, Safa Kiddis, Linda Moore, and Wallace (Wally) Stokes, City of Los Angeles, and Jim Coppini and Delfidio Carpio, MCM Construction, Inc. During the June 4, 2009, inspection, it was observed that heavy equipment tracks, berms, and fresh soil disturbances had occurred at the Site in the Big Tujunga Wash in waters of the state and U.S.

- j. During the June 4, 2009, inspection, Safa Kiddis and James Cassley, both representatives from the City of Los Angeles, admitted that a hydraulic spill had occurred at the Site in the Big Tujunga Wash on May 13, 2009, that construction and grading had also occurred at the Site in the Big Tujunga Wash, that material at the Site had been removed all the way down to the flat concrete bottom in order to construct forming towers from the widening approximately twenty (20) feet above, and that CWA section 404 permits and section 401 Water Quality Certification letters were not obtained prior to these activities.
- k. The June 4, 2009, inspection report identified the following: (1) The Big Tujunga Wash in the vicinity of the Site is approximately seven hundred (700) feet wide, and is braided with dry tributaries, with only a single tributary present with flowing water; (2) The Site and the 40 gallon hydraulic spill that occurred in the Site is in waters of the state and Waters of the U.S., and is an area determined to be critical habitat for the federally threatened Santa Ana sucker (U.S. Fish and Game E-mails); (3) The Big Tujunga Wash within the Foothill Bridge Widening Project construction area was visibly impacted by grading across the 700-foot width, immediately upstream of the bridge, and some grading downstream of the bridge; (4) Evidence of grading and placement of fill was apparent by the newer piles of wash debris, the flattened areas, and by the admission of Dischargers on Site that material had been moved from directly underneath the bridge; (5) The grading activity occurred in waters of the U.S.; (6) Placement of this fill is subject to requirements of a section 404 permit from the USACOE and section 401 Water Quality Certification from the Regional Board; and (7) The Dischargers failed to get the CWA section 404 permits and section 401 Water Quality Certification letters.
- l. On December 17, 2009, the Regional Board issued a CWC section 13267 investigative order (13267 Order) requiring the Dischargers to submit by January 18, 2010 (an extension was granted to February 17, 2010), information relating to the unpermitted activities and discharge of hydraulic fluid into the waters of the state at the Foothill Bridge Widening Project at the Big Tujunga Wash at Sunland, California.
- m. On December 17, 2009, Regional Water Board Executive Officer Tracy J. Egoscue issued a Notice of Violation (NOV) to the Dischargers for spilling hydraulic fluid and engaging in unpermitted grading in the Big Tujunga wash without obtaining a Clean Water Act (CWA) section 404 permit from the U.S. Army Corps of Engineers (USACOE) and a CWA section 401 Water Quality Certification from the Regional Board (State Water Resources Control Board Order No. 2003-0017-DWQ) for these activities.

VIOLATIONS

12. Under CWA section 301, the discharge of pollutants, dredge and/or fill material into waters of the state and U.S. is unlawful unless specifically permitted by CWA sections 404 and 401. CWC section 13385 subdivision (a)(5) provides, in pertinent part, that any person who violates CWA section 301 shall be subject to administrative civil liabilities of up to \$10,000 per day pursuant to CWC section 13385 subdivision (c)(1).
13. The Dischargers are liable for two (2) separate violations under CWC section 13385 subdivision (a) (5) and subdivision (c) (1) because: (1) They violated section 301 of the CWA by failing to obtain a CWA section 404 permit from the USACOE and a CWA section 401 Water Quality Certification from the Regional Board prior to discharging pollutants into waters of the state and U.S. from November 5, 2007 to June 8, 2009; and (2) They unlawfully discharged 40 gallons of hydraulic fluid into waters of the state and U.S. on May 13, 2009.
14. If this matter proceeds to hearing, the Interim Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including but not limited to increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this complaint through completion of the hearing.

PROPOSED LIABILITY

The State Water Resources Control Board's Water Quality Enforcement Policy (amended November, 2009)¹ establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in CWC section 13327. The Proposed Liability presents the administrative civil liability derived from the use of the penalty methodology in the Enforcement Policy. Only those steps in the methodology that are applicable to the individual violation(s) have been applied in assessing and calculating the proposed penalty amounts.

VIOLATION 1 – FAILURE TO OBTAIN 404 PERMIT AND 401 CERTIFICATION

10-STEP PENALTY CALCULATION METHODOLOGY

Step 3 - Per Day Assessments for Non-Discharge Violations

This Regional Board calculates an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. These violations include, but are not limited to, the failure to conduct routine monitoring and reporting, the failure to provide required information, and the failure to prepare required plans. While these violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. The Water Boards shall use the matrix set forth below to determine the

¹ The Enforcement Policy may be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

initial liability factor for each violation. The per day assessment would then be the Per Day Factor multiplied by the maximum per day amount allowed under the California Water Code.

Table 3 shall be used to determine the initial penalty factor for a violation. The Water Boards should select a penalty factor from the range provided in the matrix cell that corresponds to the appropriate Potential for Harm and the Deviation from Requirement categories. The numbers in parenthesis in each cell of the matrix are the midpoints of the range.

TABLE 3 - Per Day Factor

Deviation from Requirement	Potential for Harm		
	Minor	Moderate	Major
Minor	0.1 (0.15)	0.2 (0.25)	0.3 (0.35)
Moderate	0.2 (0.25) 0.3	0.3 (0.35) 0.4	0.4 (0.55) 0.7
Major	0.3 (0.35) 0.4	0.4 (0.55) 0.7	0.7 (0.85) 1.0

The category chosen for **Potential for Harm** in Table 3 are:

Major - The characteristics of the violation present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm. Additionally, non-discharge violations involving particularly sensitive habitats should be considered major.

The categories for **Deviation from Requirement** in Table 3 are:

Major - The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

Staff determined that the Potential for Harm was Major since “[t]he characteristics of the violation present a particularly egregious threat to beneficial uses, and... additionally, the non-discharge violations involve a particularly sensitive habitats [that] should be considered major... [T]he circumstances of the violation Indicate a very high potential for harm.” In this case sensitive habitat is referred to by Christine Medak (U.S. Fish and Wildlife) in an email to Kenneth Wong (U.S. Army Corps of Engineers) on June 8, 2009:

The Project site is located in critical habitat for the federally threatened Santa Ana sucker (*Catostomus santaanae*) and this species has been recorded recently both upstream and downstream of the Project site. It is reasonable to assume the Santa Ana sucker occurs in the Project area when adequate flows are present. Heavy equipment was operated in the wetted channel in order to facilitate construction of the Project. In addition, approximately 30-40 gallons of hydraulic fluid spilled into

the water on May 13 as a result of the Project. According to California Department of Fish and Game warden George Struble there was inadequate spill response equipment present at the site to contain and clean up the spill.

Therefore, the characteristics of the violation present a substantial potential for harm.

Given the matrix above to calculate an initial liability factor for the violations, staff determined that the Deviation from Requirement was Major since the Dischargers completely disregarded the requirement to submit the 401 Certification, or "rendered ineffective," thus constituting a complete deviation from the requirement. Therefore, from the range given in the matrix, Staff selected a Per Day Factor of 1.0, which was the highest factor in the given matrix.

Pursuant to CWC section 13385 (a) (5), the Regional Board may assess a maximum administrative civil liability of \$10,000.00 for each day in which the Discharger(s) failed to submit the required documentation, after so requested by the Regional Board.

The bridge construction project lasted from November 5, 2007 through June 8, 2009, a total of 582 days. However, given the records submitted under the 13267 Order and a statement made by email from Safa Kaddis on July 9, 2010, estimates from daily logs indicate that MCM Construction had been active in the Big Tujunga Wash for a total of 95 days. The initial per day assessment is the Per Day Factor multiplied by the maximum per day amount allowed under the CWC times the number of days of violation. Therefore, \$950,000.00 is the initial amount of the penalty.

However, in accordance with the revised Enforcement Policy, an alternative approach to penalty calculation for violations that last more than 30 days may be used if one of three findings is made by the Regional Board. Regional Board staff has determined that this multiple-day approach is appropriate since the violations result in no economic benefit from the illegal conduct that can be measured on a daily basis. For violations that last more than 30 days, the liability shall not be less than an amount that is calculated based on an assessment of the initial liability amount for the first day of the violation, plus an assessment for each 5 day period of violation until the 30th day, plus an assessment for each 30 days of violation thereafter. Since this violation lasted 95 days, only 9 days worth of violations would be accrued, based on a per day assessment for day 1, 5, 10, 15, 20, 25, 30, and so forth for every additional 30 days of violation.

After adjusting the number of days in violation, Staff calculated the Initial Amount of the Administrative Civil Liability as \$90,000.00. This amount was determined by multiplying the Per Day Factor (1.0) by the adjusted number of days of violation (9 days) by the maximum per day amount (\$10,000.00).

Step 4 – Adjustment Factors

Violator's Conduct Factors:

There are three additional factors that should be considered for modification of the amount of the initial liability: the violator's culpability, the violator's efforts to cleanup or cooperate with

regulatory authorities after the violation, and the violator's compliance history. See Table 4 below:

TABLE 4 - Violators Conduct Factors

Factor	Adjustment
Culpability	Discharger's degree of culpability regarding the violation. Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between 0.5 to 1.5 , with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior.
Cleanup and Cooperation	Extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between 0.75 to 1.5 , with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent.
History of Violations	Prior history of violations. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this.

After each of the above factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Staff considered Violator's Conduct Factors to calculate adjustments to the amount of the Initial Amount of the Administrative Civil Liability as follows:

Culpability - The Dischargers have a high degree of culpability for the violation. The Dischargers knew to submit the required 401 Certification Application at the onset of the project, despite later representations from the Dischargers that they would work outside of waters. The Discharger therefore knew that once they began work inside of the waters, that a CWA 404 Permit and a CWA 401 Certification would be required. The Dischargers failed to comply with these requirements, and a reasonable and prudent person would have submitted the required 401 Certification Application to come into compliance. Therefore, Staff selected 1.1, which is a higher multiplier in the given range. The Initial Amount of \$90,000.00 was then multiplied by 1.1, which resulted in \$99,000.00.

Cleanup and Cooperation – The Dischargers did provide cleanup. Therefore, Staff selected 0.75, which when multiplied by \$99,000.00 resulted in \$74,250.00.

History of Violations – There is no known history of prior violations by the Dischargers. Therefore staff selected 0.75 which multiplied by \$74,250.00 resulted in the amount of \$55,687.50.

Step 5 – Determination of Total Base Liability Amount

The Total Base Liability Amount is determined by adding the amounts above for each violation, though this may be adjusted for multiple day violations as noted above. Depending on the statute controlling the liability assessment for a violation, the liability can be assessed as either a per day penalty, a per gallon penalty, or both.

After considering the Adjustment Factors, Staff calculated the Total Base Liability (\$55,687.50 plus \$ 5,630.63 (from violation #2 – see calculations below) amount as \$61,318.13.

Step 6 – Ability to Pay and Ability to Continue in Business

Staff believes the Dischargers ability to pay the Total Base Liability Amount will not affect the Discharger's ability to continue in business. Therefore, Staff selected 1, which is a neutral multiplier. Accordingly, the Total Base Liability Amount was not adjusted.

Step 7 – Other Factors as Justice May Require

Staff believes that the Total Base Liability Amount determined using the above factors is appropriate. Therefore, Staff selected 1, which is a neutral multiplier. Accordingly, the Total Base Liability Amount was not adjusted.

The costs of investigation and enforcement are "other factor as justice may require" and should be added to the Total Base Liability Amount. Staff costs incurred by the Regional Board to date are \$9,000. This amount was added to the Total Base Liability Amount, which equals \$70,318.13.

Step 8 – Economic Benefit

Staff determined the cost-savings for non-compliance to be \$640 which is the amount of the 401 Certification Base Fee.

Step 9 – Maximum and Minimum Liability Amounts

The Regional Board is not required to assess any minimum liability amount for these violations; therefore, the minimum liability amount is \$640. The maximum liability amount for 582 days of violation is \$5,820,000.

Step 10 – Final Liability Amount

In accordance with the above methodology, Staff recommends a Final Liability Amount of \$70,318. Staff has determined that this Final Liability Amount is within the statutory minimum and maximum amounts.

VIOLATION 2 – 40 GALLON HYRAULIC SPILL

10-STEP PENALTY CALCULATION METHODOLOGY

Step 1 - Potential for Harm for Discharge Violations

Factor 1: Harm or Potential Harm to Beneficial Uses

This evaluation considers the harm that may result from exposure to the pollutants or contaminants in the illegal discharge. The score evaluates direct, indirect, or potential for harm in light of the statutory factors of the nature, circumstances, extent, and gravity of the violation.

A factor value of 2 was determined because there was a “below moderate” threat to beneficial uses. Impacts are reasonably expected, harm to beneficial uses are minor.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge

This score is based on the physical, chemical, biological, or thermal nature of the discharge and the risk or threat. For purposes of this Policy, "potential receptors" are human, environmental, and ecosystem health exposure pathways.

A factor of 2 was chosen, because the discharged material poses an above-moderate risk or a direct threat to potential receptors. The chemical and physical characteristics of the discharged material exceed known risk factors and there is substantial concern regarding receptor protection.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor because less than 50% of the discharge is susceptible to cleanup or abatement, regardless of whether the discharge was actually cleaned up or abated by the violator.

Final Score - "Potential for Harm"

The total scores above are added to provide a Potential for Harm score for each violation or group of violations, as an axis for the Penalty Factor in Tables 1 and 2. A score of 4

has been determined (between a maximum score of 10 and a minimum score of 0).

Step 2 – Assessment for Discharge Violations

Where there is a discharge, the Water Boards shall determine an initial liability amount on a per gallon basis using on the Potential for Harm score and the extent of Deviation from Requirement of the violation. These factors will be used in Table 1 below to determine a Per Gallon Factor for the discharge.

TABLE 1 - Per Gallon Factor for Discharges

	Potential for Harm									
Deviation from Requirement	1	2	3	4	5	6	7	8	9	10
Minor	0.005	0.007	0.009	0.011	0.060	0.080	0.100	0.250	0.300	0.350
Moderate	0.007	0.010	0.013	0.016	0.100	0.150	0.200	0.400	0.500	0.600
Major	0.010	0.015	0.020	0.025	0.150	0.220	0.310	0.600	0.800	1.000

The per gallon assessment would then be the Per Gallon Factor multiplied by the number of gallons subject to penalty multiplied by the maximum per gallon penalty amount allowed under the California Water Code.

The Deviation from Requirement reflects the extent to which the violation deviates from the specific requirement that was violated. The category for Deviation from Requirement in Table 1 was chosen to be Major because “The requirement has been rendered ineffective” (the discharger disregarded the requirement), and a potential for harm (Column 5) was used. Therefore, the factor equals **0.025**. The hydraulic spill was estimated to be 40 gallons. The statutory maximum per gallon equals \$10.00. Since 40 gallons were discharged, the per gallon assessment obtained by multiplying 40 gallons by the factor 0.25 times \$10 per gallon equals \$10.00.

Per Day Assessments for Discharge Violations

Where there is a discharge, the Water Boards shall determine an initial liability factor per day based on the Potential for Harm score and the extent of Deviation from Requirement of the violation. These factors will be used in Table 2, below, to determine a Per Day Factor for the violation. The per day assessment would then be the Per Day Factor multiplied by the maximum per day amount allowed under the California Water Code.

TABLE 2 - Per Day Factor for Discharges

	Potential for Harm									
Deviation from Requirement	1	2	3	4	5	6	7	8	9	10
Minor	0.005	0.007	0.009	0.011	0.060	0.080	0.100	0.250	0.300	0.350
Moderate	0.007	0.010	0.013	0.016	0.100	0.150	0.200	0.400	0.500	0.600
Major	0.010	0.015	0.020	0.025	0.150	0.220	0.310	0.600	0.800	1.000

The Potential for harm was determined as 10 as threatened, rare or endangered species are in the area or immediately downstream. The Deviation from Requirement was determined as Major because "The requirement has been rendered ineffective," therefore, the per day factor equals one.

The numbers of days of violation were one and the statutory per day penalty is \$10,000.00. gallon and per day discharges equals \$10,010.00 (Initial Amount). Therefore, the amount equals \$10,000.00. Subtotaling the ACL for per gallon and per day discharges equals \$10,010.

Step 4 – Adjustment Factors

Violator's Conduct Factors

There are three additional factors that should be considered for modification of the amount of the initial liability: the violator's culpability, the violator's efforts to cleanup or cooperate with regulatory authorities after the violation, and the violator's compliance history.

In determining culpability, adjustment should result in a multiplier between 0.5 to 1.5, with the lower multiplier for accidental incidents, and a higher multiplier for intentional or negligent behavior.

The hydraulic fluid spill appears to be an accident, however, there was inadequate spill response equipment present at the site to contain and clean up the spill. Therefore, Staff selected 1.0, as the multiplier in the given range; multiplying the Initial Amount by that factor results in \$10,010.

Cleanup and Cooperation – The Dischargers cleaned up the spill, and cooperated with the 13267 Order, although the Dischargers never contacted this Regional Board about the spill. Therefore, Staff selected 0.75, as the lowest multiplier in the given range; multiplying \$5,005.00 by that factor results in \$7,507.50.

History of Violations – Staff is not aware of any prior violations by the Dischargers in the same connecting water of the state and U.S. Therefore, Staff selected 0.75, and multiplying \$7,507.50 by that amount equals \$5,630.63.

TOTAL LIABILITY AMOUNT

The total liability amount assessed against the Dischargers for both of the alleged violations as set forth above is \$70,318.

Regulations of the US Environmental Protection Agency require public notification of any proposed settlement of the civil liability occasioned by violation of the Clean Water Act including NPDES permit violations. Accordingly, interested persons will be given 30 days to comment on any proposed settlement of this Complaint.

Samuel Unger

Samuel Unger, P.E.

Interim Executive Officer

7-29-10
Date

Attachment A: Calculation Methodology Spreadsheet

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R4-2010-0112**

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent the City of Los Angeles (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint No. R4-2010-0112 (hereinafter the "Complaint"). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served [with the complaint]. The person who has been issued a complaint may waive the right to a hearing."

☐ **(OPTION 1: Check here if the Discharger waives the hearing requirement and will pay the recommended liability.)**

- a. I hereby waive any right the Discharger may have to a hearing before the Regional Water Board.
- b. I certify that the Discharger will remit payment for the civil liability imposed in the amount of \$70,318 by check that references "ACL Complaint No. R4-2010-0112" made payable to the "State Water Pollution Cleanup and Abatement Account". Payment must be received by the Regional Water Board by August 30, 2010, or this matter will be placed on the Regional Water Board's agenda for a hearing as initially proposed in the Complaint.
- c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period expires. Should the Regional Water Board receive significant new information or comments from any source (excluding the Regional Board's Prosecution Team) during this comment period, the Regional Water Board's Interim Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I understand that this proposed settlement is subject to approval by the Regional Water Board, and that the Regional Water Board may consider this proposed settlement in a public meeting or hearing. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.
- d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

See next page for Option 2

☐ (OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.)

- a. I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the complaint, but I reserve the ability to request a hearing in the future.
- b. I certify that the Discharger will promptly engage the Regional Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s).
- c. By checking this box, the Discharger requests that the Regional Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the Regional Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

(Print Name and Title)

(Signature)

(Date)

Samuel Unger, P.E.
Interim Executive Officer
Los Angeles Regional Water Quality Control Board

Date

ATTACHMENT A

Instructions

1. Select Potential Harm Factor for Discharge Violations
2. Select Characteristics of the Discharge
3. Select Susceptibility to Cleanup or Abatement
4. Select Deviation from Standard
5. Click "Determine Harm & per Gallon/Day."
6. Enter Values into the Yellow Highlighted Fields

Select Item
Select Item
Select Item
Select Item

Select Item
Select Item
Select Item
Select Item

Discharger Name/ID: FOOHILL BRIDGE WIDENING PROJECT

		Violation 1		Violation 2	
Step 1	Potential Harm Factor (Generated from Button)				
Step 2	Per Gallon Factor (Generated from Button)				
	Gallons				
	Statutory / Adjusted Max per Gallon (\$)				
	Total				
	Per Day Factor (Generated from Button)				
	Days				
	Statutory Max per Day				
	Total				
Step 3	Per Day Factor				
	Days				
	Statutory Max per Day				
	Total				
Initial Amount of the ACL					
Step 4	Culpability				
	Cleanup and Cooperation				
	History of Violations				
Step 5	Total Base Liability Amount				
Step 6	Ability to Pay & to Continue in Business				
Step 7	Other Factors as Justice May Require				
	Staff Costs				
Step 8	Economic Benefit				
Step 9	Minimum Liability Amount				
	Maximum Liability Amount				
Step 10	Final Liability Amount				

Penalty Day Range Generator

Start Date of Violation=	11/5/07
End Date of Violation=	6/8/09
Maximum Days Fined (Steps 2 & 3) =	95 Days
Minimum Days Fined (Steps 2 & 3) =	9 Days

**HEARING PANEL OF THE
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION**

320 W. 4th Street, Suite 200
Los Angeles, California 90013
(213) 576-6600

ACLC No. R4-2010-0112

NOTICE OF PUBLIC HEARING

**TO CONSIDER AN ADMINISTRATIVE CIVIL LIABILITY COMPLAINT AND
PROPOSE RECOMMENDATIONS**

DISCHARGERS

The City of Los Angeles
MCM Construction, Inc.

DISCHARGE LOCATION

Foothill Bridge Widening Project
Big Tujunga Wash

RECEIVING WATERS

Big Tujunga Wash

Administrative Civil Liability Complaint (ACLC) No. R4-2010-0112 alleges that City of Los Angeles and MCM Construction, Inc., (Dischargers) are liable for two (2) separate violations under CWC section 13385 subdivision (a) (5) and subdivision (c) (1). First, the Dischargers violated section 301 of the CWA by failing to obtain a CWA section 404 permit from the USACOE and a CWA section 401 Water Quality Certification from the Regional Board prior to discharging pollutants into waters of the state and U.S., and prior to dredging and/or filling material into waters of the state and U.S. Second, the Dischargers unlawfully discharged 40 gallons of hydraulic fluid into waters of the state and U.S. As stated in the ACLC, Regional Board staff, represented by the Regional Board Staff Prosecution Team (Prosecution Team), recommends that a penalty of \$70,318 be assessed against the Dischargers for these violations.

Pursuant to Water Code section 13228.14, a Hearing Panel consisting of three or more members of the California Regional Water Quality Control Board, Los Angeles Region ("Regional Board") will convene a hearing to hear evidence, determine facts, and to propose a recommendation to the Regional Board about resolution of the ACLC.

This notice sets forth procedures to be used by hearing panels of the Regional Board and outlines the process to be used at this hearing.

I. HEARING DATE AND LOCATION

Date: October 27, 2010
Time: 10:00 A.M.
Place: 320 W. 4th Street

Public Utilities Commission Hearing Room
320 W. 4th Street, 5th Floor
Los Angeles, California 90013

II. AVAILABILITY OF DOCUMENTS

The ACLC and other documents concerning the subject of the ACLC are available for inspection and copying between the hours of 8:00 a.m. and 5:00 p.m. at the following address:

California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Arrangements for file review and/or obtaining copies of the documents may be made by contacting the Case Manager of the Prosecution Team (identified in section V below). Comments received, the Prosecution Team's proposed Hearing Panel Report and Order, and other subsequent relevant documents will be available as they are received or generated.

The entire file will become a part of the administrative record of this proceeding, irrespective of whether individual documents are specifically referenced during the hearing or contained in the Hearing Panel binder. However, the entire file might not be present at the hearing. Should any parties or interested persons desire that the Prosecution Team bring to the hearing any particular documents that are not included in the Hearing Panel binder, they must submit a written or electronic request to the Case Manager of the Prosecution Team (identified in section V below) so that it is received by **5:00 pm on October 7, 2010**. The request must identify the documents with enough specificity for the Prosecution Team to locate them. (Documents in the Hearing Panel binder will be present at the hearing.)

III. NATURE OF HEARING

This will be a formal adjudicative hearing pursuant to section 648 *et seq.* of Title 23 of the California Code of Regulations. Chapter 5 of the California Administrative Procedure Act (commencing with section 11500 of the Government Code) relating to formal adjudicative hearings does not apply to adjudicative hearings before the Regional Board, except as otherwise specified in the above-referenced regulations.

IV. PARTIES TO THE HEARING

The following are the parties to this proceeding:

1. The City of Los Angeles and MCM Construction, Inc.
2. Regional Board Staff Prosecution Team

All other persons who wish to participate in the hearing as a designated party shall request party status by submitting a written or electronic request to the Legal Advisor to the Hearing Panel identified in section VIII below so that it is received by **5:00 pm on September 13, 2010**. All requests for designation as a party shall include the name, phone number, and email address of the person who is designated to receive notices about this proceeding. The request shall also include a statement explaining the reasons for their request (e.g., how the issues to be addressed in the hearing and the potential actions by the Regional Board affect the person), and a statement explaining why the parties designated above do not adequately represent the person's interest. The requesting party will be notified before the hearing whether the request is granted. All parties will be notified if other persons are so designated.

V. COMMUNICATIONS WITH THE PROSECUTION TEAM

The California Administrative Procedure Act requires the Regional Board to separate prosecutorial and adjudicative functions in matters that are prosecutorial in nature. A Prosecution Team, comprised of Regional Board enforcement and other staff, will serve as the complainant in the proceedings and is a designated party. The Case Manager over this matter, who will coordinate the efforts of the Prosecution Team, is Mr. Dana Cole, Engineering Geologist. Ms. Shannon Chambers, Staff Counsel from the State Water Resources Control Board's Office of Enforcement will advise the Prosecution Team prior to and at the panel hearing. None of the members of the Prosecution Team will be advising the Regional Board in this matter or have engaged in any substantive conversations regarding the issues involved in this proceeding with the any of the Board Members or the advisors to the hearing panel (identified below).

Any communication with the Prosecution Team prior to the hearing should be directed to the Case Manager:

Dana Cole
320 W. 4th Street, Suite 200
Los Angeles, CA 90013
(213) 576-5733
dcole@waterboards.ca.gov

VI. PUBLIC COMMENTS AND SUBMITTAL OF EVIDENCE

A. Submittals By Parties.

Not later than **September 7, 2010**, the Prosecution Team will send the parties a preliminary Hearing Panel binder containing the most pertinent documents related to this proceeding and a PowerPoint presentation, which summarizes the evidence and testimony that the Prosecution Team will present and rely upon at the hearing.

The City of Los Angeles and MCM Construction, Inc. is required to submit:

- 1) Any additional documents or evidence the Party wants the Hearing Panel to consider,

- 2) A summary of any testimony the Party intends to present, and
- 3) A statement regarding how much time the Party needs to present the case

to the attention of the Case Manager of the Prosecution Team (as identified above) and other designated parties so that it is received by **5:00 pm on September 28, 2010**. The Prosecution Team shall have the right to present additional evidence in rebuttal of matters submitted by any other party.

The Prosecution Team will send to the Hearing Panel and the parties a final Hearing Panel binder no later than **October 15, 2010**.

B. Submittals By Interested Persons.

Persons who are not designated as parties above, that wish to comment upon or object to the proposed ACLC, or submit evidence for the Hearing Panel to consider, are invited to submit them in writing to the Prosecution Team (as identified above). To be evaluated and responded to by the Prosecution Team, included in the final Hearing Panel binder, and fully considered by the Hearing Panel in advance of the hearing, any such written materials must be received by **5:00 pm on August 30, 2010**. If possible, please submit written comments in Word format electronically to DCole@waterboards.ca.gov. Interested persons should be aware the Regional Board is entitled to settle this matter without further notice, and therefore a timely submittal by this date may be the only opportunity to comment upon the subject of this ACLC. If the hearing proceeds as scheduled, the Hearing Panel will also receive oral comments from any person during the hearing (see below).

VII. HEARING PROCEDURES

Adjudicative proceedings before the Hearing Panel generally will be conducted in the following order:

- Opening statement by Hearing Panel Chair
- Administration of oath to persons who intend to testify
- Prosecution Team presentation
- Discharger presentation
- Designated parties' presentation (if applicable)
- Interested persons' comments
- Prosecution Team rebuttal
- Questions from Hearing Panel
- Deliberations (in open or closed session)
- Announcement of recommendation to the Regional Board

While this is a formal administrative proceeding, the Hearing Panel does not generally require the cross examination of witnesses, or other procedures not specified in this notice, that might typically be expected of parties in a courtroom.

Parties will be advised by the Hearing Panel after the receipt of public comments, but prior to the date of the hearing, of the amount of time each party will be allocated for presentations. That

decision will be based upon the complexity and the number of issues under consideration, the extent to which the parties have coordinated, the number of parties and interested persons anticipated, and the time available for the hearing. The parties should contact the Case Manager by **5:00 pm on September 28, 2010** to state how much time they believe is necessary for their presentations (see Section VI.A above). It is the Regional Board's intent that reasonable requests be accommodated.

Interested persons are invited to attend the hearing and present oral comments. Interested persons may be limited to approximately five (5) minutes each, for their presentations, in the discretion of the Chair, depending on the number of persons wishing to be heard. Persons with similar concerns or opinions are encouraged to choose one representative to speak.

For accuracy of the record, all important testimony should be in writing, and delivered as set forth above. The Hearing Panel will include in the administrative record written transcriptions of oral testimony or comments made at the hearing.

VIII. COMMUNICATIONS WITH THE HEARING PANEL

A. Ex Parte Communications Prohibited.

As an adjudicative proceeding, Regional Board members and their advisors may not discuss the subject of this hearing with any person, except during the public hearing itself, except in the limited circumstances and manner described in this notice. **Any communications to the Regional Board, Hearing Panel, or Hearing Panel Advisors before the hearing must also be copied to the Prosecution Team and other Party(ies), as identified above.**

B. Hearing Panel Advisors.

The Hearing Panel will be advised before and during the hearing by Jenny Newman, and a Legal Advisor, Jeff Ogata, Staff Counsel for the Regional Board. Neither Jenny Newman nor Mr. Ogata have exercised any authority or discretion over the Prosecution Team, or advised them with respect to this matter.

C. Objections to manner of hearing and resolution of any other issues.

1. Parties or interested persons with procedural requests different from or outside of the scope of this notice should contact the Case Manager at any time, who will try to accommodate the requests. Agreements between a party and the Prosecution Team will generally be accepted by the Hearing Panel as stipulations.

2. Objections to (a) any procedure to be used or not used during this hearing, (b) any documents or other evidence submitted by the Prosecution Team, or (c) any other matter set forth in this notice, must be submitted in writing and received by the Legal Advisor to the Hearing Panel (identified below) by **5:00 pm on September 28, 2010**:

Jeff Ogata
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814
(916) 341-5190
JOgata @waterboards.ca.gov

Untimely objections will be deemed waived. Procedural objections about the matters contained in this notice will not be entertained at the hearing. Further, except as otherwise stipulated, any procedure not specified in this hearing notice will be deemed waived pursuant to section 648(d) of Title 23 of the California Code of Regulations, unless a timely objection is filed.

3. Any issues outside the scope of those described in section C.2, above, that cannot be resolved by stipulation shall be brought to the attention of the Legal Advisor to the Hearing Panel, as set forth in section C.2, by **5:00 pm on September 28, 2010** if possible, and if not possible, then at the earliest possible time with an explanation about why the issue could not have been raised sooner.

IX. QUESTIONS

If you have any questions about this Notice of Public Hearing, please contact as appropriate, the Case Manager of the Prosecution Team, or the Legal Advisor to the Hearing Panel as described above.

Date: July 29, 2010